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No. 07-1239

In the Supreme Court of the United States

DONALD C. WINTER, SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

DANIEL J. DELL'ORTO
Acting General Counsel
Department of Defense
FRANK R. JIMENEZ
General Counsel
THOMAS N. LEDVINA
CRAIG D. JENSEN
J. PAGE TURNEY
Attorneys
Department of the Navy
LILY FU CLAFFEE
General Counsel
Department of Commerce
JANE C. LUXTON
General Counsel
MARY BETH WARD
JOEL LA BISSONNIERE
Attorneys
National Oceanic and Atmospheric Admin.
EDWARD A. BOLING
General Counsel
Council on Environmental Quality
Washington, D.C.

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
RYAN D. NELSON
Deputy Assistant Attorney General
ANTHONY A. YANG
Assistant to the Solicitor General
ANDREW C. MERGEN
MICHAEL R. EITEL
LUTHER L. HAJEK
ALLEN M. BRABENDER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The district court found a likelihood that the Navy failed to comply with the National Environmental Policy Act of 1969 (NEPA) and preliminarily enjoined the Navy's use of mid-frequency active (MFA) sonar during training exercises that prepare Navy strike groups for worldwide deployment. The President of the United States determined that the use of MFA sonar during these exercises is "essential to national security," and the Chief of Naval Operations concluded that the injunction unacceptably risks the training of naval forces for deployment to high-threat areas overseas. The Council on Environmental Quality (CEQ), applying a longstanding regulation, accordingly found "emergency circumstances" for interim compliance with NEPA before completing an environmental impact statement. The Ninth Circuit nevertheless sustained the district court's conclusion that no "emergency circumstances" were present and affirmed the preliminary injunction. The questions presented are:

1. Whether CEQ permissibly construed its own regulation in finding "emergency circumstances."

2. Whether, in any event, the preliminary injunction, based on a preliminary finding that the Navy had not satisfied NEPA's procedural requirements, is inconsistent with established equitable principles limiting discretionary injunctive relief.

PARTIES INVOLVED

Petitioners are Donald C. Winter, Secretary of the Navy; U.S. Department of the Navy; Carlos M. Gutierrez, Secretary of Commerce; National Marine Fisheries Service; James W. Balsiger, Acting Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration; and Vice Admiral Conrad C. Lautenbacher, Jr., Administrator of the National Oceanic and Atmospheric Administration.

Respondents who were plaintiffs-appellees below are Natural Resources Defense Council, Inc.; International Fund for Animal Welfare; Cetacean Society International; League for Coastal Protection; Ocean Futures Society; and Jean-Michel Cousteau.

Respondent California Coastal Commission was intervenor-appellee below.

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OPINIONS BELOW

The opinion and order of the court of appeals (Pet. App. (App.) 1a-90a, 91a-95a) are reported at 518 F.3d 658 and 518 F.3d 704; a prior opinion and order (App. 171a-174a, 175a-194a) are reported at 508 F.3d 885 and 502 F.3d 859. The orders of the district court (App. 96a-137a, 150a-170a, 195a-218a) are reported at 527 F. Supp. 2d 1216 and 530 F. Supp. 2d 1110 and available at 2007 WL 2481037. Other orders of the district court (J.A. 86-89; App. 138a-144a, 145a-149a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2008. The petition for a writ of certiorari

was filed on March 31, 2008, and was granted on June 23, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions are set out in the appendix to the petition for a writ of certiorari. App. 358a-365a.

STATEMENT

This case concerns a matter of vital importance to the Nation's naval defenses. The Southern California Operating Area (SOCAL), an area in the Pacific Ocean west of Southern California and Northern Mexico, has long been used by the United States Navy for training exercises. See Pet. App. 336a-337a (hereinafter "App."); J.A. 123 (maps of SOCAL). The Navy has conducted training using mid-frequency active (MFA) sonar within SOCAL for over 40 years. That historical practice has taken on added significance in light of ongoing hostilities in which the United States is engaged and developments in submarine technology by potentially hostile nations.

In this case, the Navy scheduled a series of up to 14 certification exercises in SOCAL, from February 2007 through January 2009, to prepare naval strike groups for deployment to the western Pacific and Middle East. The use of MFA sonar to detect submarines is an essential element of those exercises, which train the thousands of military personnel in a strike group to operate as an integrated unit in simultaneous air, surface, and undersea warfare. The Navy has completed ten of the planned exercises in compliance with the statutes that provide substantive protection for marine mammals: the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. 1361 *et seq.*, and the Endangered Species Act of 1973 (ESA),

16 U.S.C. 1531 *et seq.* Those ten exercises, like the ones over the past 40 years, have produced no evidence of sonar-related injury to any marine mammal. Various marine mammal species have continued to migrate along the California coast for decades in areas where MFA sonar is routinely used. App. 275a. More importantly, the President has determined that the exercises and the Navy's use of MFA sonar during these exercises is "essential to national security." App. 232a. The Ninth Circuit nevertheless affirmed a preliminary injunction barring use of MFA sonar in critical respects during those exercises based solely on a finding of a likely violation of the procedural provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

1. a. The existence of a well-equipped and well-trained Navy has long been regarded as vital to the Nation's security. See 2 *State of the Union Messages of the Presidents 1790-1966*, at 2038 (Fred L. Israel ed., 1966) (Theodore Roosevelt) ("an adequate and highly trained navy is the best guaranty against war"); *The Federalist* No. 24, at 160-162 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Congress accordingly has directed that the Navy "shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea," and it "is responsible for the preparation of naval forces necessary for the effective prosecution of war." 10 U.S.C. 5062(a). Congress has further directed that "[t]he Navy shall develop aircraft, weapons, tactics, technique, organization, and equipment of naval combat and service elements." 10 U.S.C. 5062(d).

In fulfillment of its mission, the Navy deploys forces in strike groups that include either an aircraft carrier (with an air wing) or an amphibious assault ship (with a Marine expeditionary unit) accompanied by three to five

other surface combatant ships. App. 8a n.6; 316a-317a. Each ship trains separately before a strike group is organized, but it must also complete integrated training as part of the strike group to enable the group's thousands of Sailors and Marines to function effectively as a single combat force. App. 8a-9a & n.6, 320a, 342a-343a; J.A. 562-565. The Composite Training Unit Exercises (C2Xs or COMPTUEXs) and Joint Task Force Exercises (JTFEXs) at issue in this case train strike groups in the integrated use of a broad range of air, surface, and subsurface warfare skills requiring close coordination of all strike-group assets. The exercises attempt to replicate with live opposition forces the real-world conditions that strike groups face while performing actual military missions and defending the fleet. *Ibid.*; J.A. 109-110, 133-134; 07-56157 C.A. E.R. (E.R.) 103.

The Navy conducts training exercises the way it would have to fight in actual combat. Integration of the efforts of thousands of personnel to make the exercises a meaningful simulation of real-world military situations is exceptionally complex. The exercises are conducted under "austere, hostile conditions" (J.A. 110) that "stress every aspect of strike group performance" through complex battle problems and advanced, unscripted war games (App. 342a-344a). They hone the skills needed to "examine and prioritize every potential threat, balance competing demands of specific warfare commanders, and apportion limited assets to counter threats," while executing military missions and maintaining "force protection." J.A. 111; see J.A. 109-110, 116-118, 125-126.

Such exercises are often the only opportunity Sailors and Marines have to train in an environment that replicates to the greatest extent possible the real-world military situations they may confront. And the only opportu-

nity for the Navy's Pacific Fleet strike groups to conduct such training is in COMPTUEX and JTFEX exercises in SOCAL. App. 271a, 342a; J.A. 127-128. SOCAL is the only complex on the west coast containing all land, air, and at-sea bases (including an instrumented range on the ocean floor and amphibious landing areas) necessary to train air, sea, and undersea forces simultaneously in an integrated manner. J.A. 118, 123, 141-143, 231; App. 182a, 235a, 327a-328a, 337a.

b. Anti-submarine-warfare training, including the use of MFA sonar, is a critical aspect of such exercises. App. 9a. The Navy continuously deploys strike groups to high-threat areas in the western Pacific and Middle East where the Nation's potential adversaries operate modern diesel-electric submarines that incorporate technological advances making them extremely quiet and difficult to detect. J.A. 230, 566-568, 571; App. 270a-271a. A diesel-electric submarine operating on battery power "is nearly undetectable to U.S. and allied naval forces using passive SONAR alone." App. 274a. MFA sonar is therefore a strike group's *only* effective means to detect and track such submarines before they close within weapons range, and such timely detection therefore "is essential to U.S. Navy ship survivability." App. 269a-271a, 274a, 277a; see J.A. 230-231, 235, 566-567.

Anti-submarine warfare using MFA sonar is extraordinarily complex. The propagation of sound undersea varies significantly with water density, temperature, salinity, currents, above-surface weather conditions, and sea-floor bathymetry; the infinite combinations of those conditions require intensive real-world sonar training to "master the art and processes of identifying submarines in the complex subsurface environment." J.A. 572. Moreover, proficiency in MFA-sonar operations is

"highly perishable." J.A. 566, 572. Repeated training therefore is required to achieve and maintain combat proficiency and effectiveness. *Ibid.*; App. 277a-279a, 356a. That training, moreover, must develop the skills needed to coordinate the anti-submarine efforts of strike-group assets and overcome additional complexities that arise from the simultaneous use of MFA sonar by multiple ships (including mutual interference). J.A. 573.

Training in real-world conditions designed to replicate real-world scenarios with a live, subsurface adversary whose tactics will exploit the ocean's ever-changing complexity is essential. That training is the best practical experience a sonar operator will have before he encounters an actual military crisis. And, as noted, such sonar training must occur as an important element of the coordinated efforts of a carrier or amphibious assault ship, its escort ships, and other assets to conduct simultaneously offensive and defensive air, sea, undersea, and amphibious operations in simulated warfare conditions where resources are limited and time is of the essence. App. 270a-271a, 279a-285a; J.A. 568-570.

2. In preparation for the current series of 14 COMPTUEXs and JTFEXs, the government took a series of actions to assure compliance with environmental statutes.

a. In October 2006, the Navy determined that the MFA-sonar component of the exercises would not "affect" California's coastal zone and submitted a "consistency determination" to the California Coastal Commission pursuant to the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 *et seq*. App. 29a; 16 U.S.C. 1456(c)(1)(A) and (C); 15 C.F.R. 930.41.

b. In 16 U.S.C. 1371(f) (Supp. V 2005), Congress authorized the Secretary of Defense, after conferring with

the Secretary of Commerce (or Interior, as appropriate),[1] to exempt any actions undertaken by the Department of Defense from the MMPA if he determines that it is "necessary for national defense." On January 23, 2007, the Deputy Secretary of Defense, exercising delegated authority, invoked that statutory authorization and issued a two-year National Defense Exemption (NDE II) from the MMPA for certain military readiness activities, including MFA-sonar use during the exercises at issue here, concluding that the exemption was "necessary for the national defense." App. 219a-220a.

The NDE II requires the Navy to comply with 29 marine-mammal-protective measures developed in consultation with the National Marine Fisheries Service (NMFS), the component of the Department of Commerce responsible for implementing the MMPA's protections for marine mammals such as whales and other cetaceans. App. 220a-230a; cf. 16 U.S.C. 1362(12)(A); 50 C.F.R. 216.2, 216.8. Those measures include the use of at least five "extensive[ly] train[ed]" lookouts on each ship to aid in detecting marine mammals; the reduction of a ship's sonar transmission level by 6 dB and 10 dB if a marine mammal is detected within 1000 and 500 yards, respectively; and the cessation of sonar transmissions if a marine mammal is detected within 200 yards. App. 222a-226a.

c. On February 9, 2007, NMFS issued a biological opinion under the ESA (E.R. 768-952 (reproduced in part at J.A. 90-106)), which found that, while MFA-sonar ex-

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[1] The Secretary of Commerce implements MMPA protections for cetaceans (*e.g.*, whales and dolphins) and all pinnipeds (*e.g.*, seals and sea lions) other than walruses. 16 U.S.C. 1362(12)(A). The Secretary of Interior implements MMPA protections for all other marine mammals (*e.g.*, walruses, polar bears, otters, and manatees). *Ibid.*

posure from the SOCAL exercises would likely harass members of threatened or endangered species by temporarily disrupting their behavioral patterns, such exposure is not likely to harm, injure, or kill any listed marine mammal, and, therefore, would not likely jeopardize the continued existence of any listed marine-mammal species. E.R. 907; 16 U.S.C. 1536(a)(2). NMFS further exercised its statutory authority to issue an "incidental take statement," subject to several conditions, that authorizes the Navy to "take" listed species incidental to MFA-sonar use. E.R. 906-910; see 16 U.S.C. 1536(b)(4)(iv) and (*o*)(2).

d. Finally, in February 2007, the Navy issued an environmental assessment (EA) under NEPA for up to 14 planned exercises in SOCAL through January 2009. See E.R. 44-336 (reproduced in part at J.A. 107-224); E.R. 339-635 (EA appendices). An EA is generally prepared by an agency under NEPA in order to determine whether an environmental impact statement (EIS) is required for a proposed action. 40 C.F.R. 1501.3, 1501.4(b) and (c). An EIS, in turn, is prepared for proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C); see 40 C.F.R. Pt. 1502. NEPA regulations contemplate that the text of final EISs for "proposals of unusual scope and complexity" shall normally be "less than 300 pages" in length. 40 C.F.R. 1502.7.

The Navy's 293-page EA comprehensively evaluated scientific evidence and the results of computer modeling to predict the effect of MFA sonar on marine mammals. That model defined "Level A" harassment as an action that "injures or has the significant potential to injure a marine mammal" in the "slightest" degree, including any permanent hearing loss (known as a permanent threshold

shift (PTS)). J.A. 160-161, 163, 165. The model defined "Level B" harassment as an action that disturbs a marine mammal by disrupting its natural behavior patterns, including actions predicted either to cause short-term hearing loss (temporary threshold shift (TTS)) or to disrupt temporarily a mammal's behavior without hearing loss (sub-TTS). J.A. 161-165, 175-176.

"All level B harassment" that the Navy modeled involved "short term and temporary" effects that would be "highly unlikely" to cause "behavioral patterns [to be] abandoned or significantly altered." J.A. 175; see J.A. 168, 177-178. The model consciously "over-estimate[d]" the number of harassing exposures by assuming that marine mammals were evenly distributed throughout SOCAL and would not move to avoid sonar exposure, and that sonar use would proceed without the mitigation measures adopted in NDE II. J.A. 171, 175-176.

Using those assumptions, the model predicted 80,684 annual sub-TTS exposures (short-term behavioral disruptions with no hearing loss), 78,877 of which involved various non-endangered, non-threatened species of dolphin, which travel in large pods and are easily detected and protected with the NDE II mitigation measures. J.A. 223-224; see J.A. 181, 184, 189-192, 195-197.[2] The assessment further predicted 4080 annual TTS exposures

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[2] Dolphins, porpoises, and other marine mammals often "purposefully swim[] close to [a Navy] ship" and "'play' by riding on the [ship's] bow-wave," "even during active MFA sonar transmissions," indicating that these animals "are not adversely affected by the use of sonar." App. 346a. The portion of the modified injunction in this case that is triggered by the presence of marine mammals (see p. 12, *infra*) accordingly is inapplicable when "it appears that the dolphins or porpoises are intentionally following the naval vessel to play or ride in the vessel's bow wave." App. 140a, 148a.

(short-term hearing loss), all but 90 of which involved the same seven dolphin species. J.A. 223-224. An additional 274 annual non-injurious (Level-B) exposures were predicted for non-endangered, non-threatened beaked whales—13 TTS and 261 sub-TTS exposures. J.A. 178-179, 185-186, 198-199, 223-224 & n.**. The model's only predicted injuries to marine mammals were eight annual exposures of permanent hearing loss (permanent threshold shift (PTS)) for common dolphins, which the Navy's mitigation measures would be effective in preventing. J.A. 176, 183, 223-224.

The EA further explained that the Navy had adopted a "policy" under which "modeled Level B harassment of beaked whale species" would be "considered as potential Level A harassment." J.A. 200, 226. Accordingly, while the scientific "modeling predicts [only] non-injurious Level B exposures" for beaked whales, the EA tabulated those exposures as non-lethal "Level A" exposures (J.A. 223-224 & n.**) in order to identify them separately as a "potential injury." J.A. 170, 178, 185-186, 199. The EA's "total" of 282 annual Level A exposures thus reflects an estimate of eight annual injury-level exposures for common dolphins (if no mitigation measures were used) and 274 annual non-injurious exposures for beaked whales. J.A. 223-224 & n.**. To provide some context for those figures, commercial fishing caused approximately 650,000 marine-mammal deaths annually in the 1990s, with more than 6000 annual deaths in U.S. fisheries alone. J.A. 221, 518-519.

Based on its final EA, the Navy determined that its exercises from February 2007 through January 2009 would not have a significant impact on the environment and, accordingly, that NEPA did not require an EIS for those exercises. J.A. 112, 226-227. That conclusion paral-

lels the historical pattern in SOCAL. Over the last 40 years, the Navy has employed MFA-sonar systems using the same frequency and intensity (*i.e.*, the decibel level of the sonar source) as those used today and, since 1992, the number of training hours in SOCAL has declined. App. 268a-269a, 273a-274a; J.A. 119; E.R. 779. There have been no observed or documented incidents of injury or death to marine mammals resulting from MFA-sonar exposure in SOCAL in the past 40 years. Nor have there been any mass-stranding incidents or population-level effects in SOCAL attributable to MFA sonar. J.A. 104, 510-512, 541-542, 629; App. 274a-275a. Indeed, while records show that dozens of beaked and other whale strandings have been documented in SOCAL since 1982, not one of those stranding events was temporally correlated to any sonar use. J.A. 104; App. 256a-257a.

Prior to its preparation of the EA for the 14 exercises at issue in this case, the Navy had separately initiated development of an EIS in late 2006 to analyze the environmental impacts of *all* future Navy activities in SOCAL (including exercises involving MFA sonar). See 71 Fed. Reg. 76,639 (2006). The Navy released the draft EIS in April 2008, and the final EIS process is scheduled to be completed with a record of decision in January 2009. App. 235a-237a; U.S. Navy, *SOCAL EIS* <http://www.socalrangecomplexeis.com/PublicInvolvement.aspx>.

3. a. On March 22, 2007, respondents filed suit in the Central District of California, seeking a declaration that the series of 14 SOCAL exercises would violate NEPA, the CZMA, and the ESA, and to enjoin the Navy's use of MFA sonar in the exercises. E.R. 1157-1203 (complaint).

On August 7, 2007, the district court determined that respondents would not likely prevail on their ESA claim but would likely prevail on their NEPA and CZMA

claims, and it preliminarily enjoined all MFA-sonar use in the planned SOCAL exercises. App. 200a-218a. The court concluded that such sonar use would create a "near certainty" of irreparable harm to the environment, App. 217a, relying on the Navy EA's modeling of approximately 170,000 marine-mammal harassment incidents over the two-year exercise period, including 8000 instances of temporary hearing loss and what the court described as "466 cases of permanent injury to beaked and ziphiid whales." App. 204a, 206a-207a.

b. The Ninth Circuit stayed the preliminary injunction pending appeal, concluding that the district court "did not give serious consideration to the public interest" in national defense at a time of war. App. 180a-183a. Another panel of the Ninth Circuit then remanded the case on November 13, 2007, directing the district court "to narrow its injunction so as to provide mitigation conditions under which the Navy may conduct its training exercises." App. 174a.

c. On January 3, 2008, the district court issued a new preliminary injunction, App. 150a-170a, which it modified on January 10, 2008, App. 138a-149a. The court's order, as modified, directed the Navy, *inter alia*, to (1) cease sonar transmissions whenever a marine mammal is spotted within 2200 yards (1.25 miles) of any sonar source, and (2) reduce sonar power by six decibels (75%), whether or not a marine mammal is present, whenever the Navy detects "significant surface ducting," an environmental condition characterized by a mixed layer of constant water temperature extending at least 100 feet below the surface. App. 139a-140a, 142a-143a, 284a-285a, 297a.

The Chief of Naval Operations (CNO), who is responsible under 10 U.S.C. 5032 for organizing, training, and

equipping the Navy, determined that those restrictions unacceptably risk naval training, the timely deployment of strike groups, and national security. App. 341a-347a.[3] As the CNO and other high-ranking naval officers explained, the 2200-yard shut-down requirement would "crippl[e]" the Navy's ability to conduct realistic pre-deployment training and to assess a strike group's capabilities. App. 332a, 344a-346a, 353a-357a; see App. 269a-271a, 279a-285a. Similarly, a 75% power-down requirement in significant surface ducting conditions would "drastically reduce[]" the likelihood of detecting a submarine, App. 284a, and the corresponding reduction in detection range would prevent strike groups from conducting sonar operations to detect a submarine before it is positioned to attack. App. 279a-285a, 354a-356a. Training in significant surface ducting is "critical" because submariners exploit the condition in real-world military situations by hiding below the duct's thermocline, where the detection capability of even full-power sonar is reduced. App. 299a-300a, 333a.

Moreover, locating and tracking a modern diesel-electric submarine is an extraordinarily difficult task in the real world. Anti-submarine warfare is a high-stakes cat-and-mouse game that may span days and "require[] large teams of personnel working in shifts around the clock." App. 278a, 344a. Terminating or reducing sonar transmissions while attempting to locate and track a submarine, even for a relatively brief period, may allow the submarine to go undetected or escape. App. 355a-356a. Any experienced enemy submarine operator would seek to exploit such a gap in sonar transmissions to evade detec-

[3] Unredacted copies of the classified declarations of the CNO and other naval officers were provided to the Court in connection with the petition for a writ of certiorari.

tion, and no commanding officer would voluntarily surrender sonar contact on a submarine because "the stakes are too high." App. 355a. As a result, the loss of sonar-tracking capability during integrated air, surface, and subsurface training could negate the effectiveness of the entire exercise, unacceptably risking national security and the Navy's ability to deploy adequately trained strike groups. App. 345a, 354a-356a; see App. 314a-325a.

4. Petitioners appealed and sought a stay of the aspects of the injunction just described. Meanwhile, the district court's CZMA- and NEPA-based injunction prompted a series of emergency actions by the Executive pursuant to statutory and regulatory powers.

On January 15, 2008, the President exercised his express authority under the CZMA to exempt a federal activity from CZMA compliance if he finds it to be "in the paramount interest of the United States." 16 U.S.C. 1456(c)(1)(B); see App. 231a-232a. The President determined that "the COMPTUEX and JTFEX, including the use of mid-frequency active sonar in these exercises, are in the paramount interest of the United States." App. 232a. He further determined that, in light of the district court's injunction, an exemption was necessary "to ensure effective and timely training of the United States naval forces" because compliance would "undermine the Navy's ability to conduct realistic training exercises that are necessary to ensure * * * combat effectiveness." *Ibid*. The President accordingly issued the exemption to "enable the Navy to train effectively and to certify * * * strike groups for deployment" in support of activities "essential to national security." *Ibid*.

Contemporaneous with the President's action, the Council on Environmental Quality (CEQ) exercised its authority under 40 C.F.R. 1506.11 to authorize alterna-

tive arrangements for NEPA compliance in "emergency circumstances." App. 233a-249a. CEQ acted after extensive consultation with the Navy and NMFS and review of documentary materials. *Ibid.* Based on NMFS' determination that the Navy's SOCAL exercises were not expected to cause any "adverse population level effects for any * * * marine mammal populations," App. 255a, 258a, and on the imminent commencement of the next SOCAL exercise, CEQ concluded that "emergency circumstances" existed warranting "alternative arrangements for compliance with NEPA" through enhanced public-participation, research, and mitigation measures until the Navy's ongoing preparation of a SOCAL EIS is completed. App. 240a-248a. The Navy issued a decision accepting CEQ's alternative arrangements. J.A. 228-246.

5. The court of appeals remanded to permit the district court to consider the Executive's intervening actions. App. 7a. After partially staying its preliminary injunction to permit the January 2008 exercise to proceed, the district court denied petitioners' motion to vacate the injunction. App. 96a-137a. The district court questioned the constitutionality of the President's exemption under the CZMA because the court believed the exemption impermissibly rendered the court's earlier rulings advisory opinions. App. 126a-135a. Rather than decide that question, however, the court held that its preliminary injunction remained an appropriate remedy for a NEPA violation alone, explaining that CEQ's approval of alternative NEPA arrangements under Section 1506.11 was invalid because its injunction restricting strike-group training was not a "sudden, unanticipated event[]" giving rise to "emergency" circumstances under what the court regarded as "the plain language of the regulation." App. 97a, 112a-122a.

6. The court of appeals affirmed. App. 1a-90a. It likewise did not reach the validity of the President's actions under the CZMA, and it purported not to "adjudicate the meaning of the word 'emergency'" under CEQ's regulation. App. 4a n.3, 45a n.41. Instead, while recognizing that not all definitions of "emergency" supported the district court's conclusion, it held that the district court did not "abuse its discretion or rely on an erroneous legal premise in determining that CEQ's broad interpretation of 'emergency circumstances' was not authorized by 40 C.F.R. § 1506.11." App. 45a n.41, 56a. The court then affirmed the district court's conclusion that respondents had demonstrated a likelihood of success on the merits of their NEPA claim that an EIS was required. App. 60a-74a.

The court of appeals further held that the district court properly issued preliminary injunctive relief because respondents had shown a "possibility of irreparable injury" to marine mammals, App. 74a-77a, and because, in its view, the Navy failed to prove that the injunction would prevent it from effectively training or certifying its strike groups for deployment, App. 78a-87a. While noting that "there remains the possibility" the Navy would be unable to certify its strike groups because of the injunction, the court concluded the district court did not err in concluding that the balance of hardships tipped in favor of maintaining the injunction. App. 88a-89a.

At the same time, the court *sua sponte* granted a temporary partial stay of the injunction's 2200-yard mandatory shutdown and surface-ducting power-down requirements. App. 93a-95a. That stay will expire upon this Court's disposition of this case. App. 95a.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in affirming a preliminary injunction that seriously jeopardizes the Navy's ability to train Sailors and Marines for wartime deployment during a time of ongoing hostilities. The decision poses substantial harm to national security; improperly overrides the collective judgments of Congress, the President, the Nation's top naval officers and the relevant agencies charged with protecting marine mammals (NMFS) and for interpreting NEPA (CEQ); and fundamentally misapplies settled principles governing preliminary injunctions.

1. The preliminary injunction must be set aside because it is based on an erroneous understanding of the obligations imposed by NEPA. CEQ determined that "emergency circumstances" exist in this case warranting alternative NEPA arrangements under 40 C.F.R. 1506.11 because the district court's preliminary injunction greatly risks the Navy's ability to train strike groups for deployments that are essential to national security and because there would be insufficient time to complete an EIS before such deployments must occur. CEQ's interpretation fully comports with the regulatory text and, thus, was entitled to deference.

As numerous dictionaries and judicial decisions attest, an "emergency" is a condition of urgent need requiring prompt action and, in this context, emergency circumstances exist because an urgent response was needed to avert significant impending harm to the public interest. While the district court concluded that the "plain language" of "emergency" limited the term to sudden, unanticipated events requiring immediate action, the court's understanding reflects only a subset of the word's more general meaning. Indeed, the Ninth Circuit itself recog-

nized that an "emergency" can be "a situation demanding immediate attention," App. 45a n.41, and that should have been the end of the matter. The prospect of substantial and imminent harm to the national security in this case presents a quintessential example of "emergency" circumstances. CEQ's interpretation is neither plainly erroneous nor plainly inconsistent with Section 1506.11 and, therefore, is entitled to controlling weight.

The Ninth Circuit's clearly erred in ruling that it did not have to "adjudicate the meaning of the word 'emergency'" and could, instead, defer to the district court's legal interpretation under an abuse-of-discretion standard. It is well established that appellate courts owe deference to an *agency*'s interpretation of its own regulation and do not defer to alternative constructions provided by trial courts. And, because the district court's preliminary injunction rested on the court's view that respondents had shown a likelihood of success on their NEPA claim, CEQ's approval of alternative NEPA arrangements removed the legal basis for that injunction.

2. Even apart from that legal error, the Ninth Circuit fundamentally misapplied established equitable principles in affirming the preliminary injunction.

a. Congress, in the MMPA, has determined that the public interest in military readiness outweighs the interest in protecting marine mammals where, as here, the Deputy Secretary of Defense, in consultation with the Secretary of Commerce, has exempted specific readiness activities. The district court's conclusion that a preliminary injunction was necessary to prevent potential harms to marine mammals from MFA sonar exercises failed to give effect to Congress's judgment that the public interest lies in *permitting* military activity like that at issue here notwithstanding any harm to marine mammals.

Where Congress has established the priority of interests in this manner, courts of equity lack authority to disregard that balance. Congress's declaration of public policy precluded the injunction in this case.

b. The court of appeals likewise erred in holding that preliminary injunctive relief may issue on the "mere possibility" of irreparable harm. Preliminary injunctions are an extraordinary and drastic remedy, which require substantial proof and a clear showing of a "likelihood" that irreparable injury will result in the absence of relief. The Ninth Circuit's standard of a "mere possibility" of such injury impermissibly dilutes that standard. Rebutting a plaintiff's assertion of a "mere possibility" of injury will rarely be feasible. Indeed, where, as here, considerable scientific uncertainty surrounds a plaintiffs' claimed harm, the Ninth Circuit's test is virtually meaningless.

The Ninth Circuit's application of that standard in this case demonstrates that its mere possibility standard is inconsistent with the extraordinary nature of preliminary equitable relief. The Navy has conducted MFA sonar exercises in SOCAL for over 40 years, during which there has been no evidence that its training has injured marine mammals. And, while data indicate that MFA sonar exposure may be a contributing cause in stranding events in locations outside of SOCAL, the Navy's training will avoid the combination of circumstances that have characterized such incidents. NFMS accordingly determined that the Navy's exercises were not expected to result in "adverse population level effects for any * * * marine mammal populations" in SOCAL. App. 258a. The Navy's EA likewise predicts no permanent harm to marine mammals caused by MFA sonar.

Indeed, to establish a likelihood of irreparable harm to their members, the organizational respondents would

have to have show permanent or long-lasting harm to a species as a whole in order to materially diminish their ability to observe such mammals. No such showing was made.

c. The Ninth Circuit's errors extend to its approach to balancing the hardships of the parties and the public interest. In this case, the balance is clear. The harm claimed by respondents is a generalized assertion of an unquantified impact to their members' aesthetic enjoyment of marine mammals. In contrast, the immediate and substantial adverse effects of the Ninth Circuit's decision on national security are plain. The President—the Commander in Chief—determined that the injunctive order undermines the Navy's ability "to conduct realistic training exercises that are necessary to ensure combat effectiveness," "essential to national security," and in "the paramount interest of the United States." App. 232a. The Chief of Naval Operations had previously determined that the injunction creates an unacceptable risk to the Navy's ability to train for essential overseas operations at a time when the United States is engaged in war in two countries. The Ninth Circuit failed to provide sufficient deference to the military judgments regarding the degree of risk to essential military training, and its analysis made no attempt to weigh the respective magnitude of harms to the parties or the public interest. The court of appeals' review of the preliminary injunction in this case is fundamentally inconsistent with traditional principles of equity and should be reversed.

ARGUMENT

A "preliminary injunction is an 'extraordinary and drastic remedy.'" *Munaf* v. *Geren*, 128 S. Ct. 2207, 2219 (2008) (citation omitted). Such relief is warranted only where the party seeking the injunction makes a clear showing that "he is likely to prevail on the merits" and that "he will suffer irreparable injury" during litigation without an injunction. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); see *Munaf*, 128 S. Ct. at 2219; *Mazurek* v. *Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) ("clear showing" required). Moreover, a preliminary injunction is appropriate only when, on balance, the parties' competing claims of injury and the public interest also call for relief. See *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 546 n.12 (1987); *Yakus* v. *United States*, 321 U.S. 414, 440-441 (1944). The Ninth Circuit erred both in its ruling on the merits of respondent's NEPA claim and in its application of well-settled principles governing and limiting the award of equitable relief. Those errors, whether considered separately or in combination, require reversal of the judgment below.

I. THE COUNCIL ON ENVIRONMENTAL QUALITY PERMISSIBLY AUTHORIZED ALTERNATIVE NEPA ARRANGEMENTS UNDER 40 C.F.R. 1506.11 TO ADDRESS "EMERGENCY CIRCUMSTANCES" IN THIS CASE

The Ninth Circuit erred in affirming the preliminary injunction based on the district court's disagreement with CEQ's determination that "emergency circumstances" warranted alternative NEPA arrangements under Section 1506.11. CEQ's reasonable construction of its own regulation fully comports with the regulation's text and should have been given controlling weight.

A. CEQ's Interpretation Of Section 1506.11 Comports With The Plain Meaning Of "Emergency"

1. NEPA is a procedural statute that directs federal agencies—"to the fullest extent possible," but also "consistent with other essential considerations of national policy"—to prepare a "detailed statement" on "the environmental impact" of proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4331(b), 4332(2)(C); cf. *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 756 (2004) (citing *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). Congress, however, did not specify in NEPA what constitutes a "detailed statement." Instead, CEQ was "established by NEPA with authority to issue regulations interpreting it," and CEQ has exercised that authority to promulgate regulations identifying the steps that federal agencies should follow in complying with NEPA. *Id.* at 757; see 40 C.F.R. 1500.3; see also 40 C.F.R. 1501.4 and Pt. 1502. CEQ's regulations are entitled to "substantial deference." *Methow Valley*, 490 U.S. at 355-356.

Consistent with the "rule of reason" "inherent in NEPA and its implementing regulations," *Public Citizen*, 541 U.S. at 767, CEQ's regulations have for 30 years authorized agencies to use "alternative arrangements" for NEPA compliance when "emergency circumstances make it necessary to take an action" having significant environmental impact without observing the normal procedures in NEPA's implementing regulations. 40 C.F.R. 1506.11. Respondents have not contested that CEQ may properly authorize "alternative arrangements for compliance with NEPA under genuine emergency circum-

stances." App. 42a.[4] They instead have "limited [their] challenge to CEQ's application of [Section 1506.11] to the facts of this case." *Ibid.* That challenge fails.

2. CEQ determined that "emergency circumstances" exist in this case in light of the significant risk that the Navy would be unable to effectively prepare strike groups essential to national security under the district court's January 2008 injunction; the proximity of a January 2008 exercise, the failure of which would "have immediate ramifications for Navy deployments around the world;" and the lack of "sufficient time to complete an EIS" before future strike groups must be properly trained for worldwide deployment. App. 238a-240a. CEQ's interpretation of the term "emergency circumstances" on which that determination rests must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation" itself. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (citation omitted); accord *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). Because CEQ's interpretation comports with the text of Section 1506.11, it is neither "plainly erroneous" nor "plainly inconsistent with the wording of the regulation[]," *United States* v. *Larionoff*, 431 U.S. 864, 872-873

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[4] Indeed, respondent NRDC explained to Congress when Congress was considering changes to environmental statutes that "NEPA itself allows for emergency action prior to completion of environmental documentation in consultation with the CEQ." *Federal Forest Management: Hearings Before the Subcomm. on Forests and Pub. Land Mgmt. of the Senate Comm. on Energy and Natural Res.*, 104th Cong., 1st Sess. 219, 222 & n.15 (1995) (citing 40 C.F.R. 1506.11); cf. 137 Cong. Rec. 7007-7009 (1991) (removing NEPA exception from a bill because "existing CEQ regulations adequately address the need for special NEPA procedures when emergency circumstances exist" and listing 21 alternative arrangements under Section 1506.11 from 1980 to 1991).

(1977), and it is therefore entitled to be given effect by this Court.

The preliminary injunction at issue rests on the district court's view that—under "the plain language of the regulation and the limited indicia of the agency's original intent," App. 42a, 112a—only "sudden unanticipated event[s]" can give rise to an "emergency." App. 43a-45a. The court further held that no such "emergency" resulted from its January 2008 order enjoining the Navy's exercises because the injunction was an "entirely predictable" and "foreseeable" result of the Navy's failure to complete an EIS "given the parties' litigation history." App. 45a-46a; see App. 43a-50a. That ruling, sustained by the Ninth Circuit, is untenable.

3. While "emergency" certainly encompasses "unforeseen" or "unexpected" circumstances requiring immediate action, the term is more broadly defined as a "condition of urgent need for action or assistance." *The American Heritage Dictionary of the English Language* 602 (3d ed. 1992) (def. 2). That definition is reflected in numerous dictionaries that confirm that an "emergency" arises from the presence of urgent circumstances demanding prompt action and that, while emergencies often may be unforeseen or unexpected, such emergencies reflect only a subset of the term's broader meaning.[5] Com-

[5] See, *e.g.*, *The Random House Dictionary of the English Language* 636 (2d ed. 1987) ("a situation demanding immediate action," which is "usually unexpected;" "exigency"); *Webster's New Collegiate Dictionary* 368 (1981) (def. 2: "a pressing need"); *Black's Law Dictionary* 469 (5th ed. 1979) (listing multiple definitions, including "exigency" and "pressing necessity"); see also, *e.g.*, *The Oxford American Dictionary and Language Guide* 313 (1999) ("a sudden state of danger, conflict, etc., requiring immediate action"); *The Living Webster Encyclopedic Dictionary of the English Language* 321 (1971) ("A sudden, usu. unexpected, occasion or combination of events calling for immediate

mon usage verifies that understanding. If a cardiac patient fails to take his heart medicine, for instance, the resulting medical crisis is no less an "emergency" requiring immediate attention simply because it was foreseeable or the patient may have contributed to its cause.

Several courts of appeals have similarly recognized that "some genuine emergencies can be anticipated well in advance." *Pleasantview Nursing Home, Inc.* v. *NLRB*, 351 F.3d 747, 756 n.4 (6th Cir. 2003). For example, courts have recognized that a strike by air traffic controllers may give rise to an "operational emergency" even if the strike was "reasonably foreseeable" and might have been prevented. See *Letenyei* v. *Department of Transp.*, 735 F.2d 528, 531-532 (Fed. Cir. 1984) (en banc); see also 29 U.S.C. 176, 178 ("national emergency" exists where strike would "imperil the national health or safety"); *United Steelworkers* v. *United States*, 372 F.2d 922, 924 (D.C. Cir. 1966) (per curiam) ("any strike which affects [the military aircraft engine] industry" to "the jeopardy of our national safety" falls within "emergency provisions of Taft-Hartley [Act]").

The district court's order demanding an EIS before vital military exercises can effectively proceed constitutes an emergency. As the Fourth Circuit recognized, "it would be unreasonable to restrict the definition of 'emergency' to those situations in which the underlying facts are sudden and unforeseen" because, even where a government agency is fully aware of the factors leading to a predictable crisis, the circumstances that ultimately result can "constitut[e] an 'emergency'" if they "requir[e] immediate and drastic action." *United States* v. *South-*

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action."); *Webster's Third New International Dictionary of the English Language* 741 (1967) (def. 1c: "a usu. distressing event or condition that can often be anticipated or prepared for but seldom exactly foreseen").

ern Ry., 380 F.2d 49, 51 n.4, 55 n.17 (1967). Simply put, an "emergency situation" exists when an immediate response is needed to avert a significant impending harm to the public interest, and, for that reason, "[a]n assessment of blame regarding [the cause of] the predicament * * * is quite frankly irrelevant to a determination of whether [the government] is faced with an 'emergency situation.'" *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 866 (2d Cir. 1988) (finding emergency caused by city's "own intransigence"), cert. denied, 489 U.S. 1077 (1989).

4. That conclusion is especially warranted in this case. At the same time that CEQ approved the alternative arrangements, the President determined that the Navy's training exercises, including the use of MFA sonar, are "in the paramount interest of the United States" and "essential to national security." See pp. 14-15, *supra*. Fulfillment of the mission the President found to be essential should not be frustrated by what the district court found to be a prior procedural error by the Navy under NEPA—especially since the Navy and NMFS had comprehensively studied the impact of MFA sonar on marine mammals and the Navy had prepared an extensive EA in seeking to comply with NEPA. The need for the Navy to carry out that mission in the wake of its Commander-in-Chief's conclusion that it is critically important to the Nation's security constitutes a genuine, intervening emergency. And even apart from the customary deference that CEQ's interpretation is owed, a court should be particularly reluctant to disregard the President's determination concerning the urgency of the training exercises at issue.

B. The Ninth Circuit Erred In Deferring To The District Court's Reading Of Section 1506.11

1. The Ninth Circuit did not itself embrace the district court's restrictive reading of "emergency," and it even acknowledged that an "emergency" can be "a situation demanding immediate attention." App. 45a n.41. Notwithstanding that acknowledgment—which should have been dispositive under *Auer*—the panel purported not to "adjudicate the meaning of the word 'emergency' here." *Ibid*. It instead sustained the district court's interpretation on the ground that the district court's analysis (though perhaps ultimately incorrect) did not rely on erroneous "legal principles" or reflect an abuse of discretion. *Ibid*. That approach to deference is backwards. Rather than accord deference to *CEQ's* authoritative interpretation, the Ninth Circuit erroneously deferred to the *district court's* contrary reading—and did so under an abuse-of-discretion standard, thereby abdicating its own responsibility to review that legal issue de novo.

The fact that the Ninth Circuit was reviewing a preliminary injunction does not support its approach. While preliminary injunctions are in some respects reviewed for abuse of discretion, a lower court's legal rulings, like the one at issue here, are reviewed de novo. *Gonzales* v. *O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 428 (2006); cf. *Munaf*, 128 S. Ct. at 2219-2220. Appellate courts therefore must determine afresh whether an agency's statutory and regulatory interpretations are entitled to deference. See, *e.g.*, *Hoult* v. *Hoult*, 373 F.3d 47, 53-55 (1st Cir.) (*Chevron* deference), cert. denied, 543 U.S. 1002 (2004); *Serono Labs., Inc.* v. *Shalala*, 158 F.3d 1313, 1318-1322 (D.C. Cir. 1998) (same). That practice reflects the general rule that a district court's "decision to grant a preliminary injunction that is premised on an

error of law is entitled to no deference and must be reversed." *Brotherhood of Maint. of Way Employes Div.* v. *Union Pac. R.R.*, 460 F.3d 1277, 1282 (10th Cir. 2006) (internal quotation marks omitted); accord *Burlington N. & Santa Fe Ry.* v. *Brotherhood of Locomotive Eng'rs*, 367 F.3d 675, 678 (7th Cir. 2004); *Delta Air Lines, Inc.* v. *ALPA*, 238 F.3d 1300, 1308 (11th Cir.), cert. denied, 532 U.S. 1019 (2001).

The Ninth Circuit's resort to abuse-of-discretion review on a question of law also is inconsistent with this Court's recognition that a preliminary injunction is an "extraordinary and drastic remedy," *Munaf*, 128 S. Ct. at 2219 (citation omitted), particularly where, as here, the Ninth Circuit acknowledged that CEQ's interpretation of "emergency" comports with a dictionary definition for the term. App. 45a n.41. Such deference effectively permits the district court to "err[] in deciding *itself* that no emergency existed" under Section 1506.11 when it is CEQ's interpretation of that regulation, not the district court's, that is "entitled to substantial deference." *National Audubon Soc'y* v. *Hester*, 801 F.2d 405, 408 n.3 (D.C. Cir. 1986) (per curiam) (reversing preliminary injunction in suit challenging emergency arrangements under 40 C.F.R. 1506.11).

2. The Ninth Circuit's observation that the district court's interpretation of Section 1506.11 found "support" in the regulation's drafting history, a prior application of Section 1506.11, and other court decisions addressing previous emergency NEPA arrangements (App. 46a-49a) suffers from a similar flaw. Because courts "must give substantial deference to an *agency's* interpretation of its own regulations," an appellate court's "task is not to decide which among several competing interpretations best serves the regulatory purpose," *Thomas Jefferson Univ.*,

512 U.S. at 512 (emphasis added), or to decide whether a district court's contrary interpretation finds some "support." The relevant question under *Auer* is whether the "agency's interpretation must be given 'controlling weight'" because it is not "plainly erroneous or inconsistent with the regulation." *Ibid.* CEQ's interpretation of Section 1506.11 meets that standard.

Nothing in the regulation's history contradicts CEQ's interpretation here.[6] Section 1506.11's limited drafting history shows that CEQ intended that federal agencies consult CEQ regarding the need for emergency action "as soon as feasible," but that the regulation provides flexibility to allow an agency to take such action even without advance consultation when an urgent need to act makes prior CEQ authorization "impractical." 43 Fed. Reg. 55,988 (1978). The court of appeals found no abuse of discretion in the district court's conclusion that this history "supports a narrow, rather than a broad interpretation of the phrase 'emergency circumstances'" and "reflects CEQ's intent to use the regulation to accommodate 'sudden unanticipated events' but not more predictable events such as provisionally unfavorable litigation results." App. 47a. But CEQ's decision to allow agencies to act on their own if the situation is so urgent that even advance consultation with CEQ is "impractical" does not speak to the question here, where the Navy *did* consult with CEQ, which approved alternative arrangements. And although the unforeseen or unexpected nature of the circumstances might be one reason why consultation may be impractical in a particular case, nothing in the regula-

[6] Even where an agency modifies its interpretation of a regulation, "the change in interpretation presents no separate ground for disregarding the [agency's] present interpretation." See *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007).

tory history suggests that CEQ believed that was the *only* situation an "emergency" could arise.

Similarly, nothing in CEQ's determination here is inconsistent with its authorization of alternative arrangements for NEPA compliance in the wake of Hurricane Katrina because there was "[in]sufficient time to follow the regular [EIS] process" to evaluate the environmental impact of critical-infrastructure reconstruction grants. See App. 46a (quoting 71 Fed. Reg. 14,713 (2006)). The "urgent national security reasons" (App. 239a) for proceeding with military training determined by the President to be "essential to national security" (App. 232a) likewise fall within any reasonable conception of "emergency" circumstances where there is insufficient time to follow the regular EIS process.

The judicial decisions cited by the Ninth Circuit as supporting the district court's injunction, App. 48a-49a, likewise fail to undermine CEQ's reading. For instance, in *Miccosukee Tribe of Indians* v. *United States*, 509 F. Supp. 2d 1288 (S.D. Fla. 2007), the court discussed CEQ's alternative arrangements allowing the Army Corps of Engineers to "deviate[] from its [own test] operations," which had raised water levels and threatened the survival of an endangered sparrow species. *Id.* at 1290. That situation was undoubtedly a "creature of [the agency's] own making," App. 43a, and may have been foreseeable, but emergency circumstances nevertheless existed because of the need for prompt action.

Similarly, *Valley Citizens* upheld CEQ's emergency-circumstances determination where, after the first Gulf War had ended but in light of the "hostile and unpredictable nature of the Persian Gulf region," 24-hour cargo-flight operations out of Westover Air Force Base were necessary under a "complex, global flight schedule" for

transporting equipment and personnel "essential to the maintenance of military readiness at home and abroad." *Valley Citizens for a Safe Env't* v. *Vest*, Civ. A. No. 91-30077, 1991 WL 330963, at *5 (D. Mass. May 6, 1991). *Valley Citizens*, like *Miccosukee Tribe*, reinforces CEQ's longstanding rationale for finding "emergency" circumstances: an urgent need for action to avoid risking significant damage to essential considerations of national policy in circumstances where there is not time to prepare the sort of NEPA documents that might otherwise be called for under CEQ's regulations. See also, *e.g.*, *National Audubon Soc'y*, 801 F.2d at 406, 408 n.3 (authorizing emergency action to take into captivity the six remaining wild condors because of decline in condor population); *Crosby* v. *Young*, 512 F. Supp. 1363, 1374-1375, 1380, 1386-1387 & n.5 (E.D. Mich. 1981) (authorizing federal loan guarantees without an EIS to permit Detroit's acquisition of property needed to mitigate severe economic impact of forthcoming plant closures).

Significantly, neither CEQ's prior determinations under Section 1506.11 nor any court decision reviewing those determinations suggests that "emergency circumstances" will not arise where, after an agency prepares a robust EA concluding that a full EIS is not required, a district court (preliminarily) disagrees and imposes injunctive restrictions on essential agency action. The approach followed by the courts below, however, would effectively *penalize the public* for an agency's arguably mistaken evaluation of NEPA's procedural requirements—even after the agency has comprehensively evaluated the specific environmental impact—by judicially deeming that the dire consequences flowing from inaction cannot constitute an "emergency" as a matter of law. That powerfully counterintuitive reading of Section

1506.11 is not compelled by the regulation's text. And because it is CEQ's interpretation—not the district court's—that is "controlling unless 'plainly erroneous or inconsistent with the regulation,'" *Auer*, 519 U.S. at 461, respondents have not demonstrated a likelihood of success on the merits.

3. The gravity of the Ninth Circuit's error is underscored by its view that it was permissible for the district court to disregard CEQ's "emergency" determination because "the Navy ha[d] been on notice of its possible legal obligations" to prepare an EIS and purportedly delayed until January 10, 2008, to seek emergency relief. App. 45a-46a. As explained, the existence of "emergency circumstances" turns on the urgent need for prompt action, not on concepts of notice or comparative fault. NEPA is to be implemented "consistent with other essential considerations of national policy," 42 U.S.C. 4331(b), and those "essential considerations" are not to be sacrificed based on a court's own notion of notice and fault.

Moreover, the Ninth Circuit's assessment of the Navy's actions was flawed even on its own terms. The Navy completed a robust EA and concluded in good faith that no EIS would be necessary for the 14 exercises scheduled to occur prior to the completion of the comprehensive SOCAL EIS in January 2009. While the district court found that the Navy's conclusion was likely wrong, it was (at a minimum) reasonable for the Navy to believe its conclusion was sound. See *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001) ("a presumption of regularity attaches to the actions of Government agencies"). No emergency arose until the court ruled to the contrary and entered an injunction jeopardizing the Navy's ability to train strike groups for deployment.

The initial August 7, 2007 injunction was promptly stayed on appeal sufficiently before the Navy's next exercise was to commence. App. 175a-194a. Then, when the Ninth Circuit subsequently remanded for entry of a narrower injunction, it noted that the Navy had previously used mitigation measures compatible with its training needs and directed the district court to issue an injunction "under which the Navy may conduct its training exercises." App. 173a-174a. It was not apparent until the district court issued its January 3, 2008 injunction on remand that the court's restrictions—which go well beyond the mitigation measures employed by the Navy—would significantly impede training exercises deemed essential to national security.

The President then immediately determined, in issuing an exemption from the CZMA, that the injunctive order "would undermine the Navy's ability to conduct realistic training exercises that are [both] necessary to ensure * * * combat effectiveness" and "essential to national security," App. 232a, and the CNO determined that the court's restrictions posed an "unacceptable risk" to the Navy's ability to train for overseas deployment necessary for national security. App. 81a, 343a-345a. The prospect of the substantial and imminent harm to the public interest—and, indeed, the Nation's security—that the President identified represents a quintessential example of "emergency circumstances" warranting alternative arrangements for complying with NEPA. The Ninth Circuit's contrary conclusion alone warrants reversal.

II. THE DISTRICT COURT'S PRELIMINARY INJUNCTION IS INCONSISTENT WITH ESTABLISHED PRINCIPLES GOVERNING INJUNCTIVE RELIEF

Even if the President's and CEQ's emergency actions had not eliminated the legal basis for respondents' NEPA claim, the preliminary injunctive relief in this case would nevertheless have been improper. First, Congress determined in the MMPA that the equitable balance between marine mammal protection and military activity necessary for national defense must be struck in favor of military readiness when the Secretary of Defense, after conferring with the Secretary of Commerce, so determines. The district court lacked discretion to disregard that congressional ordering of priorities. Second, even if respondents' aesthetic enjoyment of marine mammals could properly have been weighed against the essential military activity in this case, the preliminary injunction was improperly issued based on the "mere possibility" of irreparable harm to that aesthetic interest. And third, even if the mere possibility of such harm might be considered, the district court's balancing of the interests of the parties and the public dramatically diverges from established principles and lacks support in the record.

A. The District Court Lacked Discretion To Grant Injunctive Relief Based On Its Own Assessment of Harm to Marine Mammals

A court's equitable discretion to provide injunctive relief normally turns on a balancing of the relative hardships of the parties and the public interest once the movant has shown a likelihood of success on the merits. *Romero-Barcelo*, 456 U.S. at 312; see *Gambell*, 480 U.S. at 546 n.12. However, when Congress has itself "decided the order of priorities in a given area," a court of equity

must follow the "balance that Congress has struck" and lacks discretion to strike a different balance. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) (quoting *TVA* v. *Hill*, 437 U.S. 153, 194 (1978)). The district court's conclusion that a preliminary injunction was necessary to prevent potential harms to marine mammals improperly "ignore[d] the judgment of Congress, deliberately expressed in" the MMPA, that the public interest lies in *permitting* military activity like that at issue here notwithstanding any potential to harm marine mammals. See *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 551-552 (1937). That congressional "declaration of public interest and policy" is dispositive. *Id.* at 552.

The MMPA's prohibition on harassing, injuring, or killing marine mammals reflects Congress's judgment that the public interest normally lies in protecting such mammals to preserve their aesthetic, recreational, and economic value for the public. 16 U.S.C. 1361(6), 1362(13) and (18), 1371(a), 1372(a)(1) (2000 & Supp. V 2005). The Navy, whose members are instilled with great respect for the sea and sea life, certainly supports that general policy judgment. Congress, however, also has determined that national security can trump marine mammal protection and, indeed, has authorized the Secretary of Defense to exempt from the MMPA military activity that is "necessary for national defense." 16 U.S.C. 1371(f)(1) (Supp. V 2005). To invoke that authority, the Secretary of Defense must confer with the Secretary of Commerce (or Interior), *ibid.*, and submit notice of and the reasons for each such exemption to Congress. 16 U.S.C. 1371(f)(4) (Supp. V 2005). The MMPA thus vests the responsibility for balancing marine mammal protection against military preparedness squarely with the political Branches and

provides mechanisms for Congress's continuing oversight of the Secretary's exemption authority.

That statutory authorization, in Congress's judgment, "properly balances the equities associated with military readiness and maritime species protection" while assuring involvement by the agency charged with protecting marine mammals. See H.R. Conf. Rep. No. 354, 108th Cong., 1st Sess. 669 (2003) (Conf. Rep.). "Courts of equity cannot, in their discretion, reject th[at] balance." *Oakland Cannabis*, 532 U.S. at 497; see *Hill*, 437 U.S. at 194 ("[I]t is * * * the exclusive province of the Congress" to "formulate legislative policies and * * * establish their relative priority for the Nation."). Because the Deputy Secretary of Defense properly exempted the Navy's sonar activities from the MMPA, App. 219a-220a, subject to mitigation measures developed in consultation with NMFS, the courts below exceeded their authority by prohibiting MFA sonar use expressly *authorized* pursuant to the statutory exemption.

Indeed, Congress enacted Section 1371(f)'s exemption authority in part in reaction to respondent NRDC's prior success in obtaining a preliminary injunction against the Navy's use of low-frequency active (LFA) sonar. See Conf. Rep. 669 (discussing *NRDC* v. *Evans*, 232 F. Supp. 2d 1003 (N.D. Cal. 2002)). The court in *Evans* had "consider[ed] the public interests both in national security and in protecting marine mammals" and—like the courts below—issued what it regarded as "a carefully tailored preliminary injunction" to "permit[] the use of LFA sonar for testing and training" while imposing substantive restrictions "to reduce the risk to marine mammals and endangered species." *Evans*, 232 F. Supp. 2d at 1013, 1051-1055. Congress's enactment of Section 1371(f) conclusively rejects such judicial balanc-

ing of interests where, as here, that section has been invoked to authorize military activity notwithstanding any potential harm to marine mammals.

NEPA is, of course, a procedural statute. *Methow Valley*, 490 U.S. at 350, 353 & n.16. It neither "mandate[s] particular results" nor imposes any "requirement [to] mitigat[e]" adverse environmental impacts. *Ibid.* And the asserted substantive harms to marine mammals on which the district court sought to justify a preliminary injunction under NEPA are precisely those that Congress has determined must give way to considered judgments about national security.

Moreover, an agency's compliance with NEPA is reviewed under the APA, which contemplates that, even where relief is warranted, either declaratory *or* injunctive relief may be appropriate, 5 U.S.C. 703, and expressly preserves the "power or duty of the court to * * * deny relief on any * * * appropriate legal or equitable ground," 5 U.S.C. 702. Cf. *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting) (separation of powers problems associated with judicial interference with military training exercises abroad "make this virtually a textbook case for refusing * * * discretionary relief"), vacated on other grounds, 471 U.S. 1113 (1985); *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (Scalia, J.). Because Congress and the Secretary struck the controlling balance between military readiness and protection of marine mammals—and because the injunction in any event interferes in critical respects with training exercises determined by the President and the Chief of Naval Operations to be essential to national security—those provisions of the APA underscore the impropriety of the injunction affirmed by the Ninth Circuit.

B. The "Mere Possibility" Of Irreparable Harm Cannot Support The Preliminary Injunction

The Ninth Circuit further erred in holding that respondents need only show a "mere possibility" of irreparable harm to justify such relief, rejecting the proposition that a "significant threat of irreparable injury" must be shown. See App. 76a-77a (quoting *Earth Island Inst.* v. *USFS*, 442 F.3d 1147, 1159 (9th Cir. 2006), cert. denied, 127 S. Ct. 1829 (2007)). The Ninth Circuit's "mere possibility" standard expands the courts' equitable powers well beyond their traditional moorings and cannot be reconciled with the "stringent" standard this Court has laid down for preliminary injunctive relief. *Doran*, 422 U.S. at 931; see *Munaf*, 128 S. Ct. at 2219.

1. a. This "Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Romero-Barcelo*, 456 U.S. at 312 (citing, among others, *Sampson* v. *Murray*, 415 U.S. 61, 88 (1974)). "The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance *he will suffer* irreparable injury." *Doran*, 422 U.S. at 931 (emphasis added). While statistical certainty is unnecessary, a "likelihood of irreparable injury" is. *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004); see *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 103 (1983) ("likelihood of substantial and immediate irreparable injury") (quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 499, 502 (1974)); see also *Village of Gambell*, 480 U.S. at 545, 546 n.12; *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 340 (1999) (Ginsburg, J., concurring in part and dissenting) (citing *Doran*); *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters*, 415 U.S. 423,

441 (1974); *eBay Inc.* v. *MercExch., L.L.C.*, 547 U.S. 388, 391 (2006) (permanent injunction).

The application of equitable power before a court fully adjudicates a case renders a "preliminary injunction * * * an 'extraordinary and drastic remedy,'" *Munaf*, 128 S. Ct. at 2219 (citation omitted); *Mazurek*, 520 U.S. at 972, whose sole function is "to preserve the relative positions of the parties until a trial on the merits can be held." *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). A party requesting it must therefore proffer "substantial proof" and make a "clear showing" that such extraordinary relief is necessary. *Mazurek*, 520 U.S. at 972.

Requiring only a "mere possibility" of irreparable injury fundamentally alters—and diminishes—the threshold requirement that a clear showing be made of a "likelihood" of irreparable injury. "Likelihood sets, of course, a higher standard than 'possibility,'" *JSG Trading Corp.* v. *Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990)—not to mention "mere possibility"—of irreparable harm. The Ninth Circuit adoption of that standard effectively shifts to the Navy the burden of proving that irreparable injury would *not* occur in the absence of injunctive relief. Rebutting a plaintiff's assertion of a "mere possibility" of harm is rarely feasible, especially where evidence shedding light on actual environmental harm is scant and there is considerable scientific uncertainty. Indeed, to grant relief based on "a mere 'possibility' of [harm] would render the test for a preliminary injunction virtually meaningless." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

b. This case starkly illustrates the flaws in resting an injunction on mere possibilities of harm. The Navy's 40-year history of conducting MFA-sonar exercises in

SOCAL using the same frequency and intensity as that used today, and the absence of any demonstrated incidents of sonar-related injury to marine mammals (see p. 11, *supra*), were far more than sufficient to foreclose injunctive relief.[7] Indeed, the court of appeals itself acknowledged that "the record contains *no evidence* that marine mammals have been harmed by the use of MFA sonar in [SOCAL]." App. 76a (emphasis added). But the

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[7] Elsewhere in its opinion, the Ninth Circuit expressed the view that the record was "unclear" on whether the Navy now utilizes MFA sonar in SOCAL at a similar frequency and intensity because the Navy did not provide detailed data underlying Rear Admiral Bird's explanation of that historical trend. App. 23a-25a. The court even went so far as to suggest that the Admiral's explanation was unreliable because, in its view, "the record suggests that with the [Navy's] new class of destroyers the average MFA sonar transmission may have increased in power level and changed in frequency." App. 24a. That is incorrect.

The panel erroneously concluded that the record "suggests" that the average power output of Navy sonars recently increased because it mistakenly assumed that the SQS-53 active sonar system on the Arleigh Burke-class destroyer "replaced" the lower-power SQS-56 system found on Perry-class frigates. App. 24a (citing App. 273a and E.R. 778-779); cf. E.R. 779 (noting that SQS-53 and SQS-56 sonars operate at approximately 235 and 223 dB, respectively). Destroyers and frigates are *different* types of warships with different (though often overlapping) missions. Cf. J.A. 139-140; ER 777. The Navy's Arleigh Burke-class destroyer replaced older classes of destroyers (not frigates) that employed either the SQS-53 or SQS/SQQ-23 active sonar systems. *Jane's Fighting Ships* 727-730 (1989-1990 ed.) (describing Navy's Kidd-, Spruance-, Adams-, and Farragut/Coontz-class destroyers); see Norman Friedman, *The Naval Inst. Guide to World Weapons Systems* 626 (1991) (typical source level for SQS-23 was 244 dB) . Similarly, the lower-power SQS-56 sonar now used on the Navy's Perry-class frigates replaced the higher power SQS-26 sonars on predecessor vessels. See *Jane's Fighting Ships* 732-736 ("[a]ll" U.S. Navy frigates in 1990 "except the 'Perry' class have the large SQS 26 sonar;" describing now-retired Knox-, Garcia/Glover-, and Bronstein-class frigates); App. 269a, 273a.

court sought to minimize that critical defect in respondents' case on the ground that such harm would be "difficult to detect" and by observing that a consensus exists that "MFA sonar *may* cause injury and death to marine mammals." *Ibid.* (emphasis added). Even if the Ninth Circuit were correct on those points, the *absence* of evidence of harm over such a long period of time should have cut decidedly against any injunction, because it is respondents who bear the burden of submitting "substantial proof" and making a "clear showing" (*Mazurek*, 520 U.S. at 972) of irreparable injury.

Rather than require such a showing, the Ninth Circuit simply dismissed the conclusion of NMFS—the expert agency responsible for implementing MMPA protections for the marine mammal species at issue here—that MFA-sonar use in the Navy's exercises would not likely adversely affect any marine mammal populations. App. 65a n.53. NMFS evaluated the existing scientific evidence and found that the Navy's use of MFA sonar is "likely to elicit temporary behavioral responses from marine mammals" in SOCAL, such as "alerting responses," "temporary movement away from sound sources," and "temporary cessation of feeding or breeding activities," but that the Navy's exercises were "not expect[ed] * * * to result in adverse population level effects for *any* of these marine mammal populations." App. 258a (emphasis added).

NMFS acknowledged that MFA-sonar use has been "implicated as a contributing factor" in a number of mass stranding events in other locations and that some "species of beaked whales (none of which is listed under the Endangered Species Act)" appear to be more susceptible to injury. App. 255a, 257a. However, the available data also show that marine mammals—including beaked

whales in SOCAL—have stranded when there has been no plausible link to MFA sonar, and, even when strandings have been correlated temporally with sonar outside of SOCAL, scientists in some instances have identified likely causes that are entirely unrelated to sonar exposure. J.A. 104, 540, 613-618; App. 256a-257a. In other words, the mechanism by which MFA sonar may have contributed to marine mammal injuries is not understood and, while "several competing hypotheses" exist, "little definitive information is available." App. 257a.

In these circumstances, NMFS found it significant that stranding events that have been associated with sonar use occurred "in locations *other than California*" and "shared several common factors" including the presence together of a strong surface duct, multiple vessels simultaneously employing MFA sonar, and, significantly, "steep bathymetry adjacent to deep water and confined geography with limited escape routes for whales trying to avoid sonar sources." App. 255a, 257a (emphasis added); see J.A. 614-616. The Navy's MFA-sonar training in SOCAL occurs, by contrast, "where [the Navy] will not encounter these circumstances" together. App. 255a; J.A. 169. NMFS accordingly concluded that the Navy's use of SOCAL mitigation measures "will minimize the likelihood of beaked whales being caught in [the] circumstances that [have] characterize[d] known strandings." App. 255a-256a.

Thus, while evidence exists that sonar "may" injure or kill marine mammals under certain conditions (App. 76a), the science does not show that sonar use in SOCAL is *likely* to do so. And the Navy's 40-year history of MFA-sonar training in SOCAL with no evidence of marine mammal injuries—not to mention the fact that various species of marine mammals, including whales, have con-

tinued to follow the same migration routes in SOCAL, see App. 275a-276a—strongly confirms that conclusion. The most that can be said is that there is a "mere possibility" that MFA sonar will irreparably injure marine mammals in SOCAL. That possibility—which is little more than speculation—is wholly inadequate to support the "drastic remedy" (*Munaf*, 128 S. Ct. at 2219) of a preliminary injunction.

2. Article III remedies, moreover, must redress an "injury to the plaintiff" rather than an "injury to the environment," *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000), and the court of appeals correctly recognized that the respondent organization must establish "irreparable harm to [their] membership"—not simply to marine mammals—to obtain injunctive relief. App. 75a.

Respondents and their members claim to derive aesthetic, recreational, and vocational benefits from certain species of marine mammals in SOCAL, and they therefore contend that they would be injured if such mammals are harmed. See J.A. 384-466 (standing declarations). Respondents, however, have no legally cognizable interest in individual members of a species. Accordingly, the "loss of only one [animal] is [not a] sufficient injury to warrant a preliminary injunction"; a plaintiff "must demonstrate 'a substantial likelihood of * * * irreparable harm'" to his own interests resulting from some form of "irretrievabl[e] damage [to] the species." *Fund for Animals* v. *Frizzell*, 530 F.2d 982, 986-987 (D.C. Cir. 1975); accord *Water Keeper Alliance* v. *DoD*, 271 F.3d 21, 34 (1st Cir. 2001) (death of a "single member of an endangered species" does not qualify as irreparable harm absent showing of how "probable deaths * * * may impact the species").

Any finding of irreparable injury *to respondents* therefore must rest upon a likelihood of a harm to the species as a whole that is "permanent or at least of long duration, *i.e.*, irreparable," *Village of Gambell*, 480 U.S. 545, and that would materially diminish the ability of respondents' members to observe the species in question. The court of appeals concluded that respondents had carried their burden in the absence of such a showing, and its analysis confirms that its "mere possibility" standard impermissibly lowers the bar established by the long-standing requirement of a likelihood of such harm.

The court relied upon the EA's tabulation of 564 non-fatal Level-A harassments as showing that MFA sonar will "cause permanent harm to marine mammals." App. 76a. That conclusion, however, neither accurately reflects the Navy's EA nor addresses how respondents' members would be irreparably harmed. The Navy's modeling predicted eight annual *non*-fatal Level A harassments for common dolphins based on the assumption that the Navy would not employ its mitigation measures. J.A. 223-224 & n.**. The EA explained that such injuries "would not occur," however, because dolphins, which frequently surface and travel in large groups, are easily spotted and avoided with the Navy's mitigation measures. J.A. 184.

The remaining "Level A" harassments tabulated by the EA involve beaked whales. Yet the EA explains that the underlying computer modeling predicted only *non*-injurious Level-B harassments for beaked whales. J.A. 178, 185-186, 199, 224 nn.**. The Navy adopted a "policy" under which "modeled Level B harassment of beaked whale species" would be "considered as a potential Level A harassment" and they therefore were tabulated as such. J.A. 200; see J.A. 170, 226. But such mod-

eled, *temporary* harms do not establish that irreparable harm is actually likely to result even to an individual beaked whale, much less to the species as a whole or to respondents. Indeed, respondents and their members have submitted no evidence that they have ever seen a beaked whale or have any plans to do so. See J.A. 384-466.[8] The absence of any evidence of an injury—let alone irreparable injury—to respondents underscores that the "mere possibility" of harm standard is no standard at all and is entirely at odds with the extraordinary and drastic character of preliminary injunctive relief.[9]

C. The Balance Of Hardships And The Public Interest Cannot Support The District Court's Injunction

The Ninth Circuit's distortion of equitable principles extended still further to the court's approach to balancing the hardships of the parties and the public interest. The "traditional function of equity has been to arrive at a 'nice

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[8] Even respondent Jean-Michel Cousteau claims only that he has encountered the "major baleen and toothed whales" of the world. J.A. 397. That omission, of course, is consistent with respondents' apparent view that "[b]eaked whales are particularly difficult to observe." App. 22a; cf. Resp. 08-55054 C.A. Br. 4, 57 n.20.

[9] The district court noted that respondents demonstrated that "MFA sonar *can* injure and kill marine mammals, and cause population-affecting levels of disruption," and pointed in large part to the Navy's EA. App. 163a, 216a-217a (emphasis added). But, as explained above, the EA's model predicted only *eight* injuries annually to one species (common dolphins) if the Navy failed to use its own mitigation measures. The court's reference to population-affecting levels of "disruption" thus necessarily referred to predicted "Level B" harassments (see J.A. 175-176, 223-224 & n.**), the vast majority of which would be avoided using the Navy's NDE II mitigation measures and, in any event, were predicted to be temporary, short-term, and "highly unlikely" to cause "behavioral patterns [to be] abandoned or significantly altered." J.A. 175.

adjustment and reconciliation' between the [parties'] competing claims" of injury resulting from "the granting or withholding of the injunction," through "balanc[ing] the conveniences of the parties and possible injuries to them" and "mould[ing] each decree to the necessities of the particular case." *Romero-Barcelo*, 456 U.S. at 312 (citations omitted). Beyond that, this Court has emphasized that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction," explaining that interim relief may be withheld pending "a final determination of the rights of the parties" where it would "adversely affect a public interest." *Ibid.* (quoting *Yakus*, 321 U.S. at 440). The Ninth Circuit's analysis is fatally flawed in both respects.

1. In this case, the balance tips decisively against an injunction. The United States is "currently engaged in war, in two countries," App. 181a, and many of the same men and women who must train in SOCAL must thereafter conduct daily aircraft missions or deploy into Iraq and Afghanistan from Navy strike groups. In the judgment of those responsible for their training and safety, including the President and the CNO, the preliminary injunction presents an unacceptable risk to training effectiveness and the national security of the United States. App. 231a-232a, 342a-347a. Congress has similarly determined that the public interest in protecting marine mammals must be subordinated to the interest in military preparedness activity where, as here, the Department of Defense has determined an MMPA exemption is "necessary for national defense." 16 U.S.C. 1371(f) (Supp. V. 2005); see pp. 34-37, *supra*. As discussed above, that statutory provision alone defeats any basis for an injunction. But in any event, "no governmental interest is more compel-

ling than the security of the Nation," *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker* v. *Secretary of State*, 378 U.S. 500, 509 (1964)), and, in this case, the "mere possibility" of irreparable harm asserted by respondents' cannot outweigh that paramount interest.

The Ninth Circuit itself recognized that the Navy could be unable to effectively train and successfully certify a strike group under the preliminary injunction. App. 88a-89a. But it decided that that "possibility" must become a reality before the Navy "may return to the district court to request relief on an emergency basis," since the Navy's prediction of harm to national security based on the professional military judgments of the Nation's top naval officers will be "necessarily speculative" until the Navy actually operates under the injunction's restrictions. App. 80a, 88a-89a. That asymmetrical approach to the court's "balancing" of the hardships significantly distorts the equitable principles that the court invoked.

Indeed, absent from the Ninth Circuit's analysis is any attempt to weigh the *magnitude* of potential harm to one party against the harm to the other and to the public interest. The harm claimed by respondents is their generalized assertion of an unquantified impact on their members' aesthetic enjoyment of certain marine species in SOCAL, where the expert agency charged by Congress with protecting marine mammals concluded the impact will be only minor and temporary for the individual animals involved. By contrast, the harm to the Navy and the public from the injunction is both concrete and potentially catastrophic. The Navy centers its global management of strategic naval forces around a strike group's timely preparation for deployment. The inability to do so during a scheduled COMPTUEX and JTFEX, particularly at a time of war, would severely undermine the

United States' ability to conduct warfare operations and have enormous adverse implications for national security. App. 314a-325a; see App. 343a-344a; J.A. 235, 577.

Beyond that, the ability to effectively conduct strike-group sonar training is essential to the adequate preparation of our forces before they are deployed into potentially hostile waters. As discussed above, a modern diesel-electric submarine not only poses a lethal threat to a strike group, but is "nearly undetectable" absent MFA sonar. App. 274a. Moreover, even with MFA sonar, locating and tracking an enemy submarine is an extraordinarily difficult task, which relies on "perishable skills that must be honed and realistically tested." App. 356a. Nearly a century ago, a former Assistant Secretary of the Navy observed that "the only way in which a navy can ever be made efficient is by practice at sea, under all the conditions which would have to be met if war existed." 3 *State of the Union Messages of the Presidents 1790-1966*, at 2285 (Fred L. Israel ed., 1966) (Theodore Roosevelt). While the sophistication of naval operations has increased greatly over the past century, the need for such training is no less acute.

The risk of harm to the national security by enjoining the training exercises at issue must be given great weight in any equitable balancing. The sworn declarations of the Nation's top naval officers concerning the importance of those exercises and the potential impact of the preliminary injunction on the safety of Sailors and Marines deployed abroad or on their ability to carry out vital operations in a climate with no margin for error cannot properly be dismissed as mere "speculation." The consequences for the Navy, its personnel, and the public, of that potential becoming a reality are simply too great.

2. The court of appeals ignored another aspect of the public interest that also weighs strongly against entry of an injunction: the degree to which an injunction is necessary to further the purposes of the relevant statute. See *Romero-Barcelo*, 456 U.S. at 314-315. This is not a case in which the Navy prepared no environmental documentation under NEPA or wholly disregarded a critical environmental impact in its evaluation. The Navy prepared a 293-page environmental assessment that comprehensively evaluated the possible impacts of MFA sonar on marine mammals, and NMFS has also furnished its own expert assessment of those impacts to the Navy on a number of occasions. A central purpose of NEPA—ensuring that agency decision-makers are fully informed of the relevant impacts, risks, and uncertainties, see *Public Citizen*, 541 U.S. at 768—thus was fully served, indeed, to a degree rarely matched even in the most comprehensive *EIS*. No injunction therefore could be justified in this case on the ground that still further study was necessary to fulfill the purposes of NEPA.

3. The President determined that the district court's injunction "undermine[d] the Navy's ability to conduct realistic training exercises that are necessary to ensure the combat effectiveness of * * * strike groups," App. 232a, and the CNO determined that, in his professional judgment, two provisions of the preliminary injunction in particular created unacceptable risk of harm to national security. App. 344a-345a.[10] The Ninth Circuit, however, ruled that the district court, based on a review of "the record as a whole," permissibly found that its injunction "will not likely compromise the Navy's ability to effec-

[10] The CNO's classified declaration provides further detail.

tively train and certify its west-coast strike groups." App. 81a. That conclusion was in error.

Assessing the acceptable degree of risk to the effectiveness of military training is precisely the type of "professional military judgment[]" the judiciary should avoid. *Gilligan*, 413 U.S. at 10. "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence," *ibid*., particularly where the evaluation of threats to national security must rest on "[p]redictive judgment[s] * * * made by those with the necessary expertise." *Department of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988). For these reasons, this Court has repeatedly emphasized that "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986); see *Rostker* v. *Goldberg*, 453 U.S. 57, 66 (1981).

In balancing the respective harms, however, the Ninth Circuit did not even mention the formal determination by the President—the *Commander-in-Chief*—that the restrictions imposed by the injunction would undermine the Navy's ability to conduct training necessary for combat effectiveness. App. 231a-232a. And, while the court briefly noted that the judgments of the CNO and top Navy officers are "entitled to substantial deference," it neglected to heed this Court's familiar admonitions by second-guessing the very judgments of the CNO and other naval officers to which it owed great deference. Deference in this context requires far more than respectful consideration as part of a court's review of "the evidence contained in the record as a whole." App. 81a. The exercise of professional military judgment, particularly in areas involving predictive assessments of risk, is built upon decades of real-world military experience, and

courts simply lack the independent knowledge and expertise needed to evaluate complex military judgments.

a. The Ninth Circuit nevertheless undertook its own independent review and rejected considered military assessments concerning the impact of the district court's order to terminate sonar operations whenever a marine mammal is detected within 2200-yards (1.25 miles). That distance is 11 times greater than the existing 200-yard shutdown distance developed in consultation with NMFS and employed by the Navy, App. 226a, and it would increase the surface area within which a marine mammal's presence will force a sonar shutdown by a factor of 121 (11^2). App. 226a, 332a, 344a-345a. The courts should have credited the Navy's willingness to avoid harm when possible rather than displacing the judgments of the CNO and other high-ranking naval officers that the 2200-yard mandatory shutdown requirement would "unacceptabl[y] risk" training and national security. App. 343-345. See App. 332a, 353a-357a; see also App. 269a-271a, 279a-285a.

The court of appeals rejected the CNO's assessment based on its review of after-action-reports from eight SOCAL exercises. App. 83a-84a & n.65. Those reports indicate that the Navy shut down sonar 27 times in encounters with marine mammals and, in the court's view, the 21 additional shutdowns that would have been required by a 2200-yard shut-down zone would not likely harm training. App. 83a. Even if the Ninth Circuit were correct in its assessment of the reports, its determination that little harm would result from nearly doubling the number of shutdowns would be suspect. But the court's understanding of the reports in fact was deeply flawed. Only 12 of the 27 actual sonar shutdowns were mandatory under the Navy's own mitigation measures (because

marine mammals were within 200 yards), App. 83a & n.65, and Vice Admiral Lockyear, who commands the U.S. Third Fleet, explained that the 15 voluntary shutdowns likely occurred only at "tactically insignificant times." App. 354a-356a ("No Commanding Officer surrenders contact on a submarine unless ordered to do so."). In fact, Navy commanders continued to employ MFA sonar in 72% of their encounters with marine mammals between 200 and 2200 yards, yet those operations would be enjoined under the district court's decree.[11] The court of appeals' reliance on the after-action reports thus perversely punishes the Navy (and the public) for its officers' voluntary attempts to accommodate environmental concerns when doing so will not endanger training, by imposing a mandatory judicial order to discontinue sonar operations even at significant tactical junctures.

The Ninth Circuit declined to defer to the Navy's military assessment of the risk of imposing *mandatory* shutdowns in *all* such encounters because, in its view, the after-action reports "fail[ed] to support" Admiral Lockyear's explanation. App. 84a n.65. But the after-action reports simply did not specify whether encounters occurred at tactically significant periods (*ibid.*), and they do not undermine the Admiral's explanation. Had the court of appeals properly deferred to military judgments, such an uncontradicted declaration would have been controlling. Instead, the court simply disregarded the

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[11] Eight of the 15 voluntary shutdowns occurred when marine mammals were within 2200 yards. See Pet. C.A. Exhibits in Supp. of Emergency Mot. for Stay Pending Appeal, Tab 16, Att. B at 2-3, Att. C at 3-6, Att. D at 3, Att. E at 3-5, Att. F. at A-3 to A-10, Att. G at 10-13 (after-action reports). When compared to the 21 additional encounters identified by the Ninth Circuit in which sonar use continued, Navy commanders shuttered their sonar only 28% of the time.

Navy's explanation that its voluntary actions cannot justify a *mandatory* 2200-yard shutdown zone regardless of tactical considerations. App. 354a-356a.

The Ninth Circuit cited the fact that the Navy has used a 2200-yard shut-down zone for a specific *low*-frequency active (LFA) sonar system as justifying that restriction for MFA sonar. App. 85a. But LFA sonar is utilized for the *long*-range detection of submarines (including at ranges exceeding 100 miles), *NRDC* v. *Evans*, 279 F. Supp. 2d 1129, 1161 (N.D. Cal. 2003); 08-55054 C.A. Supp. E.R. 220, and it is self-evident that the tactical impact of a 2200-yard (1.25-mile) shut-down zone for LFA sonar involves entirely different tactical considerations from those pertinent here. App. 277a-285a; cf. J.A. 508-509. The Ninth Circuit's willingness to strike out on its own in this complicated military and scientific context underscores the degree to which it has failed to defer to the professional military judgment of the Nation's most senior naval officers and overstepped the bounds of its equitable discretion under traditional principles.

b. The court of appeals similarly erred in concluding that requiring a six decibel (75%) reduction in sonar power in significant surface ducting conditions would not likely prevent effective training because "such conditions occur relatively rarely" in SOCAL. App. 86a. That rationale does not support the injunction. If significant surface ducting is not present, respondents' claim that harm to marine mammals from sonar exposure increases in such conditions has no force. And, when significant surface ducting *does* occur during ongoing exercises, the Navy must be able to train effectively in such conditions. Indeed, because submariners are trained to exploit surface ducting to conceal themselves from sonar detection, it is particularly important that sonar operators receive

training in those conditions when they do exist. Pet. 32; App. 299a-300a, 333a; see also App. 278a (MFA sonar is required in "all environments"). The injunction's 75%-power-reduction requirement—even when no marine mammal is present—renders realistic training in that environment impossible. *Ibid.*

The injunction's threat to effective training, moreover, is exacerbated by the fact that surface ducting cannot be effectively predicted in advance. App. 299a-300a, 333a. An injunction that requires the unexpected power-down of all ships in a strike group when significant surface ducting conditions arise—without regard to the tactical significance of the timing, the length of time such conditions may persist, or the presence of any marine mammal—imposes unacceptable and artificial restrictions that would "prevent[] realistic training" and thus jeopardizes the readiness of our naval forces to confront the enemy in real-world situations in which surface ducting exists. *Ibid.*; App 342a-345a; p. 13, *supra.*

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The Ninth Circuit fundamentally erred in failing to respect the Executive's judgment that "emergency circumstances" exist under NEPA and at every step of the analysis of the propriety of injunctive relief. It did so, moreover, in a manner that conflicts with the collective judgment of Congress, the President, the Nation's top naval officers and the federal agency charged by Congress with protecting marine mammals. Ultimately, it affirmed an injunction that substantially risks national security and the safety of the Nation's Sailors and Marines. That extraordinary judgment was in error.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to vacate the preliminary injunction.

Respectfully submitted.

DANIEL J. DELL'ORTO
Acting General Counsel
Department of Defense

FRANK R. JIMENEZ
General Counsel

THOMAS N. LEDVINA
CRAIG D. JENSEN
J. PAGE TURNEY
Attorneys
Department of the Navy

LILY FU CLAFFEE
General Counsel
Department of Commerce

JANE C. LUXTON
General Counsel

MARY BETH WARD
JOEL LA BISSONNIERE
Attorneys
National Oceanic and Atmospheric Admin.

EDWARD A. BOLING
General Counsel
Council on Environmental Quality

GREGORY G. GARRE
Acting Solicitor General

RONALD J. TENPAS
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

RYAN D. NELSON
Deputy Assistant Attorney General

ANTHONY A. YANG
Assistant to the Solicitor General

ANDREW C. MERGEN
MICHAEL R. EITEL
LUTHER L. HAJEK
ALLEN M. BRABENDER
Attorneys

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